

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 August 2023

**Public Authority:** Office of Gas and Electricity Markets (Ofgem)

**Address:** 10 South Colonnade  
Canary Wharf  
London  
E14 4PU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about communications between Ofgem and The Times newspaper. Ofgem refused to comply with the request, citing section 12 (cost of compliance) of FOIA as its basis for doing so.
2. The Commissioner's decision is that Ofgem was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. The Commissioner also finds that Ofgem complied with its obligations under section 16 of FOIA, by offering appropriate advice and assistance.
3. The Commissioner does not require Ofgem to take any further steps.

#### **Request and response**

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4. On 29 March 2023, the complainant wrote to Ofgem and requested information in the following terms:  

"Please can I have a copy of all correspondence you have exchanged with the Times newspaper in 2023? This should include any notes you have made of verbal conversations."
5. Ofgem responded on 28 April 2023. It confirmed that it does hold the requested information, however its searches had identified over 900

records as potentially being within the scope of the request. It therefore estimated that the cost of complying with the request would exceed the appropriate limit, and as such it cited section 12 of FOIA to refuse it.

6. Following an internal review Ofgem wrote to the complainant on 13 June 2023. It maintained its reliance on section 12 of FOIA.

## **Reasons for decision**

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### **Section 12 – cost of compliance**

7. Section 12(1) of FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
8. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for Ofgem is £600.
9. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for Ofgem.
10. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
11. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public

authority made a reasonable estimate of the cost of complying with the request.

12. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
13. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

**Would the cost of compliance exceed the appropriate limit?**

14. As is the practice in cases where the public authority has informed the complainant that it holds the information, the Commissioner asked Ofgem to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of the request.
15. In its submission to the Commissioner Ofgem stated that it should have explained that the searches conducted by its IT team had in fact returned 1,822 items which may be within the scope of the request. Its reference to approximately 900 items in its response to the complainant was because this is the number of items involving the Ofgem Communications team, whom it was felt were most likely to have had the most correspondence with The Times. However, it considers that there will also be information within the scope of the request involving members of staff outside of the Communications team, therefore it is necessary to base its estimate on the need to review all 1,822 items in order to fulfil the terms of the request.
16. Ofgem also noted that some of 1,822 items would be internal-only email exchanges rather than exchanges with The Times. However, a member of its IT team confirmed that a search separating internal-only exchanges from external exchanges would not be possible. Therefore Ofgem would still be required to review each of the 1,822 items in order to determine whether or not they fall within the scope of the request.
17. Ofgem considers it reasonable to allow an average of 1 minute per item to review and assess whether that item, or any of the information contained within it or attached to it, falls within the scope of the request. This takes into account that some correspondence will be more lengthy or will have attachments which will also need to be reviewed. This would total approximately 30.4 hours. Ofgem also estimates that it would require a further 4 hours to retrieve or extract the information which it determines is within scope, totalling approximately 34.4 hours or £850.

18. The Commissioner considers that Ofgem estimated reasonably that it would take more than the 24 hours/£600 limit to comply with the request. Ofgem was therefore entitled to refuse the request in accordance with section 12(1) of FOIA.

**Section 16(1) – the duty provide advice and assistance**

19. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making a request for information. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice<sup>1</sup> in providing advice and assistance, it will have complied with section 16(1).
20. The Commissioner notes that in its initial response to the request Ofgem advised the complainant that they may wish to reduce the time period covered by the request, in order that it may be able to deal with it under the appropriate limit. The Commissioner is therefore satisfied that Ofgem met its obligations under section 16 of FOIA.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## Right of appeal

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21. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

22. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
23. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## Signed

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**